IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* PERTAINING TO EVIDENCE OR ARGUMENT ABOUT ANY ALLEGED IMPROPRIETY OF SUING THESE DEFENDANTS WITHOUT SUING ALL OTHER SOURCES OF POLLUTION [DKT #2429]

COMES NOW the Plaintiff, the State of Oklahoma ("State"), and respectfully submits this Reply in support of its Motion *in Limine* Pertaining to Evidence or Argument About Any Alleged Impropriety of Suing These Defendants Without Suing All Other Sources of Pollution [Dkt. #2429].

I. Introduction

In its Motion *in Limine*, the State demonstrated that the Court should enter an order precluding Defendants from making any argument, doing any questioning, or proffering any evidence regarding the alleged impropriety of suing these Defendants without suing other sources of pollution in the IRW. The State demonstrated that the Court should enter the order because the State has discretion in filing suit against these Defendants. And, evidence or argument that the State has an obligation to sue at once all phosphorus or bacteria contributors is misleading and irrelevant.

In their response [Dkt. #2495], Defendants completely fail to address or attack any of the points supporting the State's Motion *in Limine*. What Defendants attempt, once again, to do is to avoid the real issue. Defendants' Response confuses the issue of the State's motion by claiming

that the State's motion stands for the proposition that Defendants cannot introduce *any* evidence of other sources of phosphorus in the IRW. In fact, the State's motion simply and correctly represents that Defendants cannot make the argument to the jury that it is improper for the State to sue these Defendants without suing other potential contributors of phosphorus in the IRW. The Court should grant the State's motion.

II. Defendants Fail To Show Why They Should Be Allowed To Introduce Evidence or Argument That the State Acted Improperly By Not Filing Suit Against Other Sources of Phosphorus.

Defendants argue in their response that "Plaintiffs seek to exclude as irrelevant any discussion of alternate sources of alleged pollution." *See* Dkt. #2429, p. 3. Defendants further argue that presenting evidence of all sources of pollution is relevant to causation. *See* Dkt. #2429, p. 3. However, what Defendants fail to argue and fail to address is how it is relevant and how it is proper for Defendants to introduce evidence and argument that the State was somehow required to sue other potential sources of phosphorus in order to sue these Defendants. It is a fundamental principle that a plaintiff may choose the defendants he names. And, even in situations where a conspiracy is alleged, it is well settled that "[a] plaintiff need not sue all conspirators; he may choose to sue but one." *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963). Therefore, the State has the absolute discretion to file suit against any party involved in the degradation of the IRW. In this instance, the State filed suit against Defendants because Defendants are the largest contributors of phosphorus pollution in the IRW.

To allow Defendants to introduce evidence and argue to the jury that the State must sue either everyone or no one at all is preposterous. Further, it misleads the jury to imply that the State should not be able to pursue its case against these Defendants because the State has not

sued other alleged sources of pollution. Such a position is clearly not the law. For these Defendants to introduce evidence and argument that their position is the law is misleading, unfair, and prejudicial. Federal Rule of Evidence 403 specifically excludes evidence that is misleading, unfair, and prejudicial. The State, like any other plaintiff, has the right to file suit against whom it chooses. Accordingly, the State's motion should be granted.

III. *Massachusetts v. EPA* Does Not Stand for the Legal Proposition That Evidence or Argument Concerning the Failure of the State To Sue Other Polluters of the IRW Is Admissible.

In their response to Plaintiff's motion, Defendants argue that *Massachusetts v. EPA*, 549 U.S. 497 (2007), stands for the proposition that evidence of selective regulation is not inadmissible evidence and improper argument. *See* Dkt. #2495, p. 5. However, Defendants fail to specifically cite where in the opinion of *Massachusetts v. EPA* this proposition is stated. What the court in *Massachusetts v. EPA* did actually opine and reiterate is that "[a] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute…" *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). Because a reform may take one step at a time, the State has chosen to address the pollution of the IRW by filing suit against these Defendants, the largest contributors of phosphorus in the IRW. For these Defendants to introduce evidence and argue that the State must remedy the pollution of the IRW by filing suit against *every* other potential source of pollution is simply contrary to the law, and would lead to confusion of the jury. As the Court in *Massachusetts v. EPA* recognized, reformation of a significant issue and problem is a process that can be addressed incrementally. The State has chosen its suit against these Defendants to remedy the degradation of the IRW; therefore, the State's motion should be granted.

IV. The Argument and Evidence That the State Seeks To Exclude Is Irrelevant.

Defendants argue in their response that "Plaintiffs seek to exclude [sorts of evidence that] are directly relevant to a central disputed fact." Response, p. 3. Defendants have entirely missed the point of the State's motion. The State's motion seeks to exclude as irrelevant and misleading any argument or evidence by Defendants that it is improper for the State to sue these Defendants without suing all other polluters of the IRW.

"Evidence which is not relevant is not admissible." F.R.E. 402. It is certainly not relevant for Defendants to present evidence and argue that the State has acted improperly by suing these Defendants and no other potential source of pollution. Said argument and evidence by these Defendants is in no way relevant to the real issues of whether Defendants have polluted the IRW. The issue in this case concerns these Defendants and their actions, not whether the State should have filed suit against other parties.

V. Conclusion.

Defendants have clearly missed (or avoided) the point of the State's Motion *in Limine*. For these Defendants to present evidence or make argument to the jury that the State is acting improperly by suing other parties who have polluted the IRW is misleading and irrelevant. Having earlier dealt with pollution from point sources, the State may now focus its remedial attention as it thinks best. Here, the State has chosen to pursue the most significant source of phosphorus loading in the IRW. As Plaintiff, the State may choose to address pollution from these Defendants in this case, and need not address all potential sources in a single action. Further, a large reformation may occur in incremental steps. For the above-stated reasons, this Court should grant the State's motion and prohibit any evidence and argument by these

Defendants that the State has acted improperly by not filing suit against all other polluters of the IRW.

Respectfully Submitted,

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I hereby certify that on this 4th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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